**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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| JANETTE L. CLEVENGER,<br><br>Claimant,<br><br>v.<br><br>LOWE'S COMPANIES, INC.,<br><br>Employer,<br><br>and<br><br>AMERICAN HOME ASSURANCE COMPANY,<br><br>Surety,<br>Defendants. | ) | **IC 03-010545**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**<br><br>Filed Sept. 15, 2006 |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to the Commissioners for hearing. On February 23, 2006, Commissioners James F. Kile and R.D. Maynard conducted a hearing in Coeur d' Alene, Idaho. Claimant was present and represented by Richard Whitehead of Coeur d' Alene. Thomas V. Munson of Boise appeared on behalf of Defendants. A pre-hearing deposition of Claimant was taken in August of 2005. Post-hearing depositions of Jeffrey John Larson, M.D., and J. Craig Stevens, M.D., were taken. Following submission of post-hearing briefs by the parties, the case came under advisement and is now ready for decision.

## ISSUES

By agreement of the parties, the issues to be decided as a result of the hearing are:

1. Whether Claimant suffered an injury arising out of the course and scope of employment;

2. Whether Claimant is entitled to medical care following February 10, 2004; and
3. Whether Claimant is entitled to temporary total disability (TTD) or temporary partial disability (TPD) benefits following February 10, 2004.

The following four issues are reserved, as they are not ripe at this time:

4. Whether, and to what extent, Claimant is entitled to permanent partial impairment (PPI);
5. Whether, and to what extent, Claimant is entitled to any disability above and beyond impairment;
6. Apportionment for a pre-existing condition; and
7. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

## CONTENTIONS OF THE PARTIES

Claimant contends she injured her back while working for Employer on August 23, 2003. Claimant was lifting a heavy box at the check stand when she had to stop lifting due to pain in her back. Claimant states that all the medical professionals involved, save Dr. Stevens, have concluded she suffered a workplace injury. Defendants paid benefits until Claimant visited Dr. Stevens on February 10, 2004. Claimant argues she is entitled to medical care related to her back injury following the exam of February 10, 2004, including a November 2005 lumbar fusion. Furthermore, Claimant is entitled to temporary income benefits from February 10, 2004 through the present time, as she has not reached maximum medical improvement (MMI).

Defendants contend a minor accident occurred at Lowe's, but that Claimant did not suffer a serious workplace injury, as supported by the medical evidence. Defendants point to Claimant's history of back problems and argue Claimant had pre-existing, symptomatic changes in her back prior to her industrial accident. Defendants state that Claimant's need for the

November 2005 fusion was not related to her industrial accident. Following the exam of February 10, 2004, Claimant is not entitled to any further medical care nor is she entitled to any further temporary income benefits.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Pat Clevenger, Shannon Roush, Sandra Dickerson, Gene Smith, and John Lord;
2. Claimant's Exhibits, A1 through A9 and B through G;
3. Defendants' Exhibits A through DD; and
4. The post-hearing depositions of J. Craig Stevens, M.D., and Jeffrey John Larson, M.D.

All objections made during the depositions are overruled. After having considered all the above evidence and the briefs of the parties, the Commission issues the following findings of fact, conclusions of law, and order.

## FINDINGS OF FACT

1. At the time of the hearing, Claimant was fifty-three (53) years of age and living in Post Falls, Idaho.

2. Claimant and her husband had lived in Lewiston, Idaho for a number of years when they decided to move to the Post Falls area for work reasons in late 2002. Claimant began working for Employer in July of 2003. On August 23, 2003, Claimant suffered an injury to her back while working for Employer. Claimant attempted to lift a box filled with four gallons of paint so she could locate the barcode to scan the item for a customer. In so doing, Claimant testified that she experienced an immediate onset of "red hot pain" in her lower back forcing her

to stop what she was doing. At hearing, Claimant described the pain as "piercing, stabbing, just white hot pain, just right into my back, just immediate, that burning hot pain." Claimant further described the onset of pain like "a poker" shooting through her back and bilaterally down her legs. She described the pain in her back as so "prominent" that "it was difficult to breathe" and she had to undo her belt. Claimant also testified that she had never felt pain like that before this incident. *See:* Hearing Transcript, pp. 68 – 69. A co-worker came and attempted to lift the box, could not do so, then opened the box so the product information could be entered manually.

3. Immediately following the lifting incident, the head cashier had Claimant go to the store's office where a co-worker gave Claimant ice to put on her back. Claimant abided by Employer's corporate policy and went to the designated medical facility, Kootenai Medical Center, to have her back evaluated. Following her visit to Kootenai Medical Center, Claimant was able to return to work with Employer with a light duty release. Employer accommodated Claimant's release and had her working phones, on a part-time basis. Even with the light duty accommodations, Claimant testified of worsening pain. *See:* Hearing Transcript, pp. 72 – 73.

4. On December 1, 2003 Claimant gave Employer her two-week notice that she would be quitting. Although Claimant testified that occasional cashiering increased her back pain, she did not notify Employer of this situation or give any reason to Employer for her voluntary quit. Claimant has not been employed since that time.

**Medicals**

5. In the late 1990s, Claimant was diagnosed with fibromyalgia. This has been a source of chronic pain for Claimant and has been documented in medical records prior to the August 2003 accident with Employer.

6. On September 22, 2003 Claimant underwent a lumbar MRI at North Idaho MRI. The results of the MRI were normal and unremarkable overall. *See:* Claimant's Exhibit A-1.

7. Claimant visited William Fouche, M.D, on December 22, 2003. Dr. Fouche noted Claimant's history of fibromyalgia, left-sided radiculopathy and sciatica extending into her lower extremities. Dr. Fouche suggested Claimant undergo a second MRI, which she did on January 28, 2004 at North Idaho Imaging Center. The correlating report indicated, "mild anterolateral vertebral body spurring. Otherwise negative." *See:* Claimant's Exhibits A-1 and A-4.

8. Claimant visited J. Craig Stevens, M.D., on February 10, 2004, at Defendants' request. Dr. Stevens viewed the September 2003 and January 2004 MRI films and noted no significant change between the September 2003 MRI and the January 2004 MRI. There was no noticeable damage to Claimant's lumbar spine. *See:* Deposition of J. Craig Stevens, M.D., p. 8. Dr. Stevens went on to perform a physical exam and concluded Claimant's exam was objectively normal. He also found positive Waddel's signs, indicating Claimant was exacerbating her pain symptoms. *Id.*, pp. 9 – 12. From there he performed an EMG on Claimant's left leg, which was entirely normal. Dr. Stevens concluded there was no objective basis for opining Claimant suffered from a specific lumbar problem. He went on to opine that a disc bulge caused by the August 2003 accident would have shown up in the first MRI of September 2003 and any apparent bulge later on was a subsequent development. Dr. Stevens further stated his opinion that minor disc bulges are a normal part of aging, present in many middle-aged people. Furthermore, these minor bulges are not consistent with the symptomatology demonstrated by Claimant. *Id.*, pp. 13 – 14.

9. On February 18, 2004 Claimant visited Jeffrey J. Larson, M.D., at the referral of Dr.

Fouche. Dr. Larson viewed the MRI of September 22, 2003 and interpreted no annular tear. Dr. Larson found Claimant's back to be within normal limits, to have no tear or herniation, no neural compression and good disc space between vertebrae. *See*: Deposition of Jeffrey John Larson, M.D., p. 6. Dr. Larson felt surgery was not indicated so he recommended injections instead. *See:* Claimant's Exhibit A-5. Claimant then visited Scott Magnuson, M.D., at the request of Dr. Larson for a series of epidural steroid injections. The injections gave Claimant a brief respite from her back pain.

10. Claimant underwent a discogram on November 11, 2004, administered by Dr. Magnuson. The discogram showed discogenic pain at L5 – S1.

11. Another MRI was performed on Claimant's L5 – S1 region on January 6, 2005 upon the recommendation of Dr. Larson. Jeanne Ellem, PA-C, an associate of Dr. Larson, viewed the new MRI and noted no significant changes or new problems. In viewing the new MRI himself, Dr. Larson noted "mild degenerative findings at L5 – S1." *See:* Claimant's Exhibit A-5. Dr. Larson then performed an IDET procedure on Claimant's back on February 9, 2005, in an effort to relieve Claimant's pain. According to Claimant's testimony, the procedure was ineffective, as it provided no pain relief. *See:* Hearing Transcript, p. 86, ll. 8 – 15. During a follow-up appointment of May 3, 2005, Dr. Larson noted Claimant still had some weakness in her back in the L5 region, as well as pain. During an August 16, 2005 visit with Claimant, Dr. Larson stated the January 2005 MRI showed a right lateral disc bulge at L5 – S1. He then referred Claimant to Dr. Ludwig, a physiatrist, who saw her on August 29, 2005. Dr. Ludwig was unable to provide Claimant with any relief. At this point Dr. Larson offered Claimant a lumbar fusion from L5 – S1.

12. Claimant visited Dr. Fouche and another physician at Post Falls Family Medicine, Christopher Billingslea, D.O., for routine follow-ups through 2005. During a May 2005 visit with Claimant, Dr. Billingslea made the following observation: "suspect some magnification of her perception of the pain from her fibromyalgia." *Id.* At some point during her visits to Post Falls Family Medicine, Dr. Billingslea began prescribing methadone for Claimant's pain. Claimant testified that the pain was greatly reduced with the help of the narcotic medication. *See:* Hearing Transcript, p. 87. Claimant was hospitalized at Kootenai Medical center for narcotic addiction in September of 2005.

13. On October 14, 2005 Dr. Larson performed a lumbar fusion on Claimant.

14. Throughout this entire period, Claimant has been intermittently receiving physical therapy. During a physical therapy session in February of 2006 Claimant indicated that she experienced some pain while the therapist was working on Claimant's back. No mention of such pain was made to the therapist. Since that time, Claimant has been taking high doses of Ibuprofen, daily, to manage pain.

## DISCUSSION AND FURTHER FINDINGS

**Accident and Causation:**

1. The Idaho Workers' Compensation Law defines "injury" as a personal injury caused by an accident arising out of and in the course of employment. An "accident" is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17).

2. It is obvious that Claimant suffered an injury caused by an accident while working for Employer. No one openly disputes this fact, and the testimony of all parties involved tells the story of a very common lifting accident resulting in a back injury. Claimant's accident can be reasonably located as to when and where it occurred. Furthermore, a First Report of Injury filled out by Employer's branch manager and dated August 24, 2003 documents Claimant's accident.

3. A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

4. The medical records in this case confirm Claimant's injury was a result of a workplace accident. The August 23, 2003 intake records for Kootenai Medical Center list Claimant's "back injury" as "accident, employment related." *See*: Claimant's Exhibit A-8. Dr. Fouche's records also refer to Claimant's injury as a "work-related injury." *Id.*, at A-4. Dr. Billingslea also agreed that Claimant's injury was work-related. *Id.*, at A-4.

**Medical Care:**

5. An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

6. Defendants paid benefits to Claimant up until February 10, 2004. It is only the time-period following Claimant's February 10, 2004 medical exam by Dr. Stevens that is at issue.

7. In this case, it is clear that numerous physicians wanted Claimant to undergo MRIs, even as recently as January of 2005. These procedures were diagnostic in nature and required by various physicians. The Commission finds all the MRIs in this case to be reasonable, diagnostic procedures.

8. The discogram performed by Dr. Magnuson was also a diagnostic procedure, and was interpreted by Dr. Magnuson as well as Dr. Larson. The Commission finds the discogram of November 11, 2004 to be a reasonable procedure. The prolonged nature of Claimant's symptoms truly left the door open for multiple diagnostic procedures as numerous physicians tried to resolve Claimant's pain issues.

9. The IDET procedure performed on February 9, 2005 was a conservative maneuver in the ongoing struggle to address Claimant's back pain. The Commission finds this procedure to be reasonable.

10. During his deposition, Dr. Larson gave a recap of Claimant's symptoms as documented by the three MRIs, all of her L5 – S1 region. The dates of the MRIs and Dr. Larson's respective opinions of each read as follows: September 22, 2003 MRI – normal; January 28, 2004 MRI – slight diffuse disc bulge; January 6, 2005 MRI – moderate diffuse disc bulge. *See*: Deposition of Jeffrey John Larson, M.D., p. 17. In interpreting these same MRIs and the opinion of Dr. Larson, Dr. Stevens agreed that the fusion performed by Dr. Larson was not a necessary treatment for Claimant's August 2003 accident. *See:* Deposition of J. Craig Stevens, M.D., pp. 17 – 20. Given the varying opinions in the interpretations of the MRIs and the seemingly benign injury to Claimant's lumbar spine, the Commission finds the record simply does not support such an invasive procedure as a lumbar fusion. Dr. Stevens' opinion regarding the necessity of the fusion is more convincing than the opinion of Dr. Larson. The record does not support Claimant's assertion that the workplace injury of August 2003 necessitated the fusion of October 2005. The medical evidence is simply too thin to link the accident to the need for such profound, major surgery. Therefore, the Commission finds the lumbar fusion of October 14, 2005 to be unrelated to the work-related accident of August 2003 and an unreasonable treatment for said accident.

**TTD/TPD Benefits:**

11. Idaho Code § 72-102(10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho

Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 614, 621 (2001).

12. Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light duty work release and which employment is likely to continue throughout his or her period of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg*, *Id*.

13. Claimant has presented medical evidence, in the form of Dr. Larson's deposition, to corroborate her belief that she is still within a period of medical recovery from her August 2003 injury. *See:* Deposition of Jeffrey John Larson, M.D., p. 11. Claimant may indeed be within her period of recovery and may be limited in the work she can do, needing to work under restrictions. The record, however, does not reflect any effort by Claimant to find such suitable work. To the contrary, the record illustrates Employer's efforts to accommodate Claimant and

allow her to work within her medical restrictions. Even with these accommodations, Claimant chose to quit her job with Employer in December of 2003. Employer's efforts to accommodate Claimant were a step above the simple offer of reasonable employment required by law. *Malueg, Id.* The Commission cannot award temporary income benefits to a claimant when she chooses to leave her suitably accommodated job and does not pursue any further employment options. Even if Claimant is not MMI, she has failed to demonstrate a wage-loss caused by factors outside of her control. Claimant could have continued working for Employer, yet she chose to quit on her own.

## CONCLUSIONS OF LAW

1. Claimant suffered an injury arising out of the course and scope of employment.
2. Claimant is entitled to the following medical care following February 10, 2004: the November 11, 2004 discogram, January 2005 MRI and the February 9, 2005 IDET procedure as well as the medical visits associated with these procedures. Claimant has failed to show that the need for a lumbar fusion was caused by the workplace accident and injury.
3. Claimant has failed to show her entitlement to temporary total disability (TTD) or temporary partial disability (TPD) benefits following February 10, 2004.

*** * * * ***

## ORDER

Based on the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant suffered an injury arising out of the course and scope of employment.
2. Claimant is entitled to the following medical care following February 10, 2004: the November 11, 2004 discogram, January 2005 MRI and the February 9, 2005 IDET

procedure as well as the medical visits associated with these procedures. Claimant has failed to show that the need for a lumbar fusion was caused by the workplace accident and injury.

3. Claimant has failed to show her entitlement to temporary total disability (TTD) or temporary partial disability (TPD) benefits following February 10, 2004.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __15th__ day of _September_____, 2006.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
James F. Kile, Commissioner

_/s/_____
R.D. Maynard, Commissioner

ATTEST:
_/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the _15th____ day of __September___, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following persons:

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___/s/_____